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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. ~~603~~ 607

FRANK SMREKAR, JR., a minor, by Frank Smrekar, Sr., his guardian ad litem,
Petitioner,

vs.

BAY AND RIVER NAVIGATION COMPANY (a corporation), and BLACK COMPANY (a corporation),
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal, State of California, First Appellate District, Division One.

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Subject Index

	Page
Opinions Below	2
Summary Statement of the Matter Involved	2
Jurisdiction	4
Statement of Facts	4
Questions Presented	4
Reasons Relied on for Allowance of the Writ	5
Conclusion	7

Table of Authorities Cited

Cases

	Pages
Norton v. Warner Co., 321 U. S. 565 (64 S. Ct. 747, 88 L. Ed. 931)	4, 5, 6, 7
Pacific Employers Insurance Co. v. Pillsbury, 130 Fed. (2d) 21	5
South Chicago Coal & Dock Company v. Bassett, 309 U. S. 251 (60 S. Ct. 544, 84 L. Ed. 732)	5

Statutes

Jones Act (March 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1920, c. 250; 46 U. S. C. A., Sec. 688)	3, 4, 5
Judicial Code, Section 237 B	4
Longshoremen's and Harbor Workers' Compensation Act (March 4, 1927, c. 509, Sec. 2, 44 Stat. 1424), 33 U. S. C. A., Section 902, paragraph 3	3
28 U. S. C. A., Sec. 344	4

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First Appellate District, Division One.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Frank Smrekar, Jr., a minor, by Frank Smrekar, Sr., his guardian ad litem, respectfully prays for a writ of certiorari to the District Court of Appeal, State of California, First Appellate District, Division One, to review the final judgment of said Court, entered June 22, 1945, affirming the judgment of the Superior Court of the State of California, in and for the City and County of San Francisco.

OPINIONS BELOW.

No opinion was rendered by the Supreme Court of the State of California. (R. 28.) The opinion of the District Court of Appeal, State of California, First Appellate District, Division One, is contained in the record. (R. 17-26.) It is printed in 69 Advance California Appellate Reports 900.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner, while on a vessel in navigable waters and while acting in the course and scope of his employment received injuries for which he brought an action at law in the Superior Court of the State of California, in and for the City and County of San Francisco, against his employer under provisions of the

Jones Act (March 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1920, c. 250; 46 U. S. C. A., Sec. 688.)

The answer of the employer, respondent Bay and River Navigation Company (a corporation), set up as a special defense that petitioner's remedy was under the Longshoremen's and Harbor Workers' Compensation Act (March 4, 1927, c. 509, Sec. 2, 44 Stat. 1424) 33 U. S. C. A., Section 902, paragraph 3, which reads:

> "The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

The trial upon said special defense was by the Court and judgment was rendered thereon in favor of respondent on March 21, 1944. (R. 15.)

Petitioner appealed to the District Court of Appeal, State of California, First Appellate District, and the judgment was affirmed by Division One of said Appellate Court on June 22, 1945. (R. 17-26.)

Petitioner then petitioned for a hearing by the Supreme Court of the State of California. (R. 27.) The petition was denied without an opinion on August 16, 1945. (R. 28.)

Remittitur was sent down August 22, 1945. (R. 29.)

JURISDICTION.

Jurisdiction of this Court is invoked under Section 237 B amended of the Judicial Code. (28 U. S. C. A., Sec. 344.) The questions were properly raised before the highest Court in the State.

STATEMENT OF FACTS.

The facts have been stated in the opinion of the District Court of Appeal. (R. 22.)

QUESTIONS PRESENTED.

1. Was petitioner on the date of his injury a member of a crew or a longshoreman?

2. Has the basic right and privilege given under Section 688 of the Jones Act and claimed by petitioner as a seaman and member of a crew been denied him?

3. Are the legal principles enunciated by this Court in *Norton v. Warner Co.*, 321 U. S. 565 (64 S. Ct. 747, 88 L. Ed. 931), its latest decision on this exact question, to be applied to cases arising under said section of the Jones Act or may the State Courts apply the legal principles enunciated by prior decisions of the Federal Courts given when reviewing deputy commissioners' decisions involving the construction of the sections of the Longshoremen's Act quoted supra?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) The District Court of Appeal, State of California, ~~Third~~ First Appellate District, Division One, has decided a federal question of substance in a way not in accord with the latest applicable decision of this Court.

The District Court of Appeal in affirming the judgment of the Superior Court based its reasoning on the premise that the answer to the question involved depended upon and was concerned with the actual duties of navigation—that is the technicalities and mechanics of navigation—the "putting over the helm". In doing so it based its decision upon *Pacific Employers Insurance Company v. Pillsbury,* 131 Fed. (2d) 21, which in turn was based on this Court's decision in *South Chicago Coal & Dock Co. v. Bassett,* 309 U. S. 251 (60 S. Ct. 544, 84 L. Ed. 732).

Petitioner asserts that the District Court of Appeal failed to give the proper effect to this Court's decision rendered in *Norton v. Warner Co.,* supra.

Petitioner submits that this Court therein applied an entirely different premise and process of legal reasoning in deciding the exact question herein involved. From it and the cases cited and approved therein petitioner contends that this Court based its decision on the premise that the term navigation is not limited to "putting over the helm", but also embraces duties essential for other purposes of the vessel. That the question does not concern the employee's actual duties but whether those duties were of a permanent nature and

for the benefit of the vessel, subject to the captain's orders and whether he had a right to look to the vessel for payment for the performance of those duties.

(2) The decision of the District Court of Appeal is untenable and should not be permitted to stand as a precedent.

The unmistakable effect of the decision of the District Court of Appeal is to permit rulings of administrative officials to destroy a basic right given under the Jones Act.

This Court has repeatedly held that the deputy commissioners' decisions cannot be set aside by the Courts because they are deemed to be against the weight of the evidence.

Cooks, surgeons, coopers, bartenders, wireless operators and clerks have been held by this Court to come within the purview of the Jones Act. And when suit has been brought under the Jones Act the test has been whether the services are for the benefit of the vessel.

This Court said in *Norton v. Warner Co.,* supra, that the Jones Act and the Longshoremen's Act are mutually exclusive federal systems.

Then why should an employee who has claimed his basic right under the Jones Act be refused this right on a different process of reasoning occasioned simply because some of his duties entailed work in the nature of that of a longshoreman?

Petitioner believes that this Court in *Norton v. Warner Co.,* supra, said that in the determination of

this exact question the same process of legal reasoning should apply without regard to which one of the federal systems the question first arose.

Petitioner also believes that the *Norton v. Warner Co.*, supra, decision secured a harmony of decision and the appropriate settlement of a question of general importance so that the two mutually exclusive federal systems may be uniformly administered.

CONCLUSION.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to the District Court of Appeal, State of California, First Appellate District, Division One, and that the final judgment of said Court in said cause be reviewed and reversed.

Dated, San Francisco, California,
November 1, 1945.

THOS. J. RIORDAN,
Counsel for Petitioner.

A. L. CRAWFORD,
RALPH BANCROFT,
Of Counsel.